No. 251

In the Supreme Court of the United States

OCTOBER TERM, 1954

ROBERT SIMMONS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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CITATIONS

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OPINION BELOW

The opinion of the Court of Appeals (R. 77-92) is reported at 213 F. 2d 901.

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1954 (R. 92). The time for filing a petition for a writ of certiorari was extended to August 14, 1954, by order of Mr. Justice Minton (R. 93), and the petition was filed on July 30, 1954. The petition was granted on October 14, 1954 (R. 93). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was basis in fact for the denial by the selective service appeal board of petitioner's claim for exemption as a conscientious objector.

2. Whether the petitioner's hearing before the Department of Justice was unfair or prejudicial to him.

3. Whether the trial court erred in refusing to require the production at the trial of the confidential Federal Bureau of Investigation investigatory report, where the registrant made no showing that the decision of the appeal board or the recommendation of the Department of Justice was based upon adverse evidence in such report which had not been disclosed to him.

STATUTE AND REGULATIONS INVOLVED

Pertinent portions of the Universal Military Training and Service Act and the implementing regulations of the Selective Service System and the Department of Justice are set forth, *infra*, pp. 51–58.

STATEMENT

Petitioner was found guilty, after a trial without a jury, of refusing, on February 9, 1953, to be inducted into the armed services in violation of Section 12 (a) of the Universal Military Training and Service Act (R. 1, 3, 14).[1] On appeal, the Court of Appeals for the Seventh

[1] Petitioner was sentenced to two years' imprisonment (R. 14–15).

Circuit affirmed the judgment of conviction, holding that the induction order was based on a valid Selective Service classification.

Petitioner's record with the Selective Service System may be summarized as follows: On September 10, 1948, petitioner, who was then 21 years old and unmarried, registered under the Selective Service laws in Waukegan, Illinois (R. 17, 38, 39–40).[2] In his selective service questionnaire which he returned on December 6, 1948, he indicated that he was employed as a chauffeur at the Great Lakes Naval Training Center, in Great Lakes, Illinois; that he had entered into this employment on February 9, 1948; that he expected to continue in this work indefinitely (R. 43); and that he had no other employment (R. 44). He indicated as his educational background eight years of grade school and 2½ years of high school (R. 44). He left blank the space in which conscientious objectors indicate their claim to such status (R. 44); he certified that he was not a minister (R. 43); and he stated his belief that his classification should be 1–A (R. 44–45). On the basis of the information contained in this questionnaire, petitioner's selective service board classified him 1–A (available for military service) on December 23, 1948 (R. 45).

On March 5, 1949, petitioner was married (R. 16). On June 4, 1951, he was reclassified

[2] Petitioner was rejected for service in the armed services in 1943 (R. 40).

3-A (deferred for reasons of dependency), and was notified on June 6, 1951, that he had been granted a dependency deferment (R. 45).

On October 22, 1951, petitioner was again tentatively placed in class 1-A (R. 27, 45) and he was sent a classification notice to this effect on October 23, 1951 (R. 45).[3] On October 30, 1951, he filed the special form for conscientious objectors, claiming exemption from both combatant and noncombatant service (R. 46–51). In answer to the question as to the circumstances under which he believed in the use of force, he replied (R. 47), "None whatsoever. Unless it be under the supervision of Jehovah God."

In describing his beliefs he stated (R. 47):

> Romans 13:1—States that Jehovah God and Christ Jesus are the higher powers and that I recognize them as the supreme powers. Peter at Acts 5:29 admonishing all footstep followers of Christ Jesus that "we must obey God rather than men."
>
> Also Paul at 2 Cor. 4:4 states Satan the Devil is the God of this system of things. Showing that we should obey the Creator rather than the Creation of God. Jehovah

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[3] This reclassification apparently came about because of the provision of the Act of June 19, 1951, ch. 144, title 1, sec. 1 (o), 50 U. S. C. App. 456 (h), which removed the President's authority to defer married men who have no dependents other than a wife solely on the basis of the marriage, unless extreme hardship is involved.

God in one of his Ten Commandments at Ex. 20: 13. "Thou shall not kill."[4]

He stated that the public expression of his views was made "from House to House, and on the street in Waukegan, Illinois" (R. 48), and although he did not further explain those activities he stated that he spent "45 hours a month in the service of Jehovah God" (R. 48). He indicated that he had been up to 1951 (and apparently still was) a federal civil service chuffeur at the Great Lakes Naval Station (R. 48; see also R. 53).[5]

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[4] Petitioner has erroneously summarized this material as follows (Pet. 8):

"Simmons filed with his local board on October 30, 1951, his conscientious objector form. He signed Series I (B) showing that he was opposed to both combatant and noncombatant military service. He answered that he believed in the Supreme Being. He stated the nature of his belief. He showed that he relied upon the Scriptural commands of Jehovah God to remain unspotted from the world. He showed that he must obey God rather than man. He then answered that the nations and the armies of the present evil world were under the lordship of Satan the Devil. He stated that he must obey the commandment of God and remain unspotted and also that he could not violate the commandments of God that prohibit killing."

[5] On the trial of this case, petitioner testified that he had filled out the special form for conscientious objectors to support his claim to being a minister, and that he thought that in making this application he was applying for a minister's classification (R. 28–31). He admitted that he did not discuss his conscientious objector claim with the board (R. 31) but apparently took the position that as a minister he had to be a conscientious objector (R. 29–31).

Petitioner testified that he was ordained as a minister on

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Petitioner was found acceptable for induction and he was so notified (R. 68). On November 26, 1951, he was classified 1–A (R. 17, 40 45). Petitioner requested a personal appearance before the local board "to give further proof of my ministry", saying nothing of a claim to being a conscientious objector (R. 71).

At his personal appearance before his local board on December 10, 1951 (R. 17), petitioner appeared alone without witnesses, and the only material submitted to the board was his special form for conscientious objectors (R. 27), and a booklet entitled "God and the State" which he showed the board members (R. 30).[6] The minutes of the board reflect that petitioner gave orally substantially the same evidence that he had set forth in his special form, and that "he made the statement he was seeking classification as a minister and *not* as a conscientious objector" (R. 68–69). Petitioner admits that he furnished evidence at the hearing (R. 18) "in support of my ministry" and that he did not inform the board that he desired exemption as a conscientious objector (R. 27–28, 31). Petitioner told the board that he had been an unordained minister of Je-

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October 28, 1951 (R. 24). Since his conscientious objector form was received at his local board on October 30, 1951 (R. 46), it would appear that his ordination was simultaneous with the claim of exemption.

[6] There is also in the record a letter filed with the local board, presumably after his personal appearance, in which petitioner restated his ministerial claim (R. 66–68).

hovah's Witnesses since December 1950, but that he was not ordained until October 1951 when that became his "regular vocation" (R. 18).

The board notified petitioner by letter dated December 11, 1951, that the evidence was insufficient to merit reopening his 1–A classification (R. 18, 66). Petitioner answered by letter received at the local board on December 18, 1951, stating that he was a "regular minister of religion", and that he wished to appeal his case to the appeal board (R. 64–65). After his records were forwarded to the appeal board (R. 40–41), it was tentatively determined that he failed to qualify for either of the two forms of conscientious objector exemption, 1–A–0 (available for noncombatant military service) or 1–0 (exempt from all military service) (R. 45–46). Thereupon, his case was referred to the Department of Justice.

On August 28, 1952, a conscientious objector hearing was conducted before a Department of Justice hearing officer. There is no evidence that, prior to the hearing, petitioner made any request for information adverse to his claim.[7]

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[7] The procedure in effect at the time of the hearing required that the registrant be notified of the time and place of the hearing and that he be furnished with written instructions informing him of his various rights including his right, *prior to the hearing and upon his request*, to be advised of the general nature and character of any evidence in the possession of the hearing officer adverse to his claim. Since the form of notice and instructions which petitioner has printed as Appendix B to his brief (Pet. Br. 75–76) were not in effect at the time of the Department of Justice

He attended, bringing his wife as his only witness (R. 19, 32–33). During this hearing, according to petitioner's own testimony, the hearing officer told him that the Federal Bureau of Investigation report stated that he had been "hanging around pool rooms", and asked him whether he still was doing so, to which question he replied in the negative (R. 19). Petitioner's wife who was present in the hearing room was asked how petitioner was treating her and she replied, "fine" (R. 19). The hearing officer recommended against reopening petitioner's classification (R. 54.)

The Department of Justice recommendation (R. 52–55) was adverse to petitioner's claim. It sets forth in some detail petitioner's background. It noted that petitioner had supported his statements of belief by citations to the Scriptures and that the general tenor of his claim was that he objected to submitting to governmental authority. The only religious activities noted were "Bible book study," "training from the Watchtower Bible and Tract Society" and "preaching from house to house and on the streets" (R. 53). It noted that while there was some evidence of present sincerity, the entire record did not support deferment. The Department's recommendation states

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hearing which petitioner now attacks on procedural grounds, and were not in use until after July 1953, we have appended hereto (*infra*, pp. 55–58) the correct version of the form and instructions which were sent to registrants in 1952.

that petitioner has been known to one informant as "a rather heavy drinker and crap shooter in and around local taverns and pool halls," although that informant believed that he was then sincere. It also noted that police records which had been consulted showed that petitioner was arrested May 29, 1950, on a complaint by his wife that he pulled her out of a car and hit her in the face, for which he was fined; that police were called to settle a "hot argument" on June 12, 1950; and that on January 6, 1952, petitioner's wife made a complaint to police that petitioner was abusive. (R. 54.) It emphasized that petitioner did not claim to be a conscientious objector when he mailed his questionnaire in 1948, and that his religious activities were coincident with the threat of induction.

On December 17, 1952, the appeal board by vote of 3 to 0 classified petitioner as 1–A (R. 19, 41).

On January 6, 1953, petitioner was ordered to report to his local board for forwarding to an induction station on January 16, 1953 (R. 35, 56–57). On that day his physical examination was not completed and it was necessary for him to report back on January 22d and January 27th, on which latter date it appeared that his examination records had been misplaced and he was told to call in for further information (R. 36–37, 60–62, 63–64, 71–72). He received permission

from his local board to go back to work until February 9th, when he was told to report for induction (R. 36–37).

On January 20, 1953, fourteen days after his order to report for induction, petitioner filed an affidavit with his local board signed by a doctor and stating that petitioner's wife was then a patient in a tuberculosis sanitarium, and that she would be dependent on her husband for care when she left the sanitarium (R. 63; Gov. Ex. 1–W). He told the clerk of his local board that he wished to have his classification reopened on the ground of dependency and family hardship, and, according to his trial testimony, he was told that when the board met they would consider this new claim (R. 20–21). On February 2, 1953, he was told that his classification would not be reopened (R. 22). On February 3, 1953, petitioner communicated with his State Selective Service Director and the National Director regarding his claim for dependency exemption and sent each a copy of the doctor's affidavit relating to his wife's physical condition (R. 23, 58–59). He was notified by the State Selective Service Headquarters on February 11, 1953, that since his application was not received until February 5, 1953, it was out of time (R. 59–60). On February 5, 1953, his local board had again classified petitioner 1–A (R. 39). On February 9, 1953, petitioner reported to the induction station but refused to

submit to induction (R. 37–38, 51, 55–56, 57–58, 72–73).

Prior to the trial of this case, petitioner filed a subpoena duces tecum demanding the production of the confidential F. B. I. investigatory report which had been made available to the Department of Justice hearing officer at the time of his conscientious objector hearing (R. 5–6). The government filed a motion to quash the subpoena. Petitioner's attorney thereupon filed an affidavit in opposition to the motion to quash setting forth, *inter alia*, that (R. 7) "It is necessary that the defendant examine and see such [F. B. I.] report relied on against him in the administrative agency in order to properly defend at the trial of the indictment in this case"; and (R. 9) "a denial of the right to offer into evidence the Federal Bureau of Investigation report in this case will be prejudicial and will deprive the defendant of his right to be confronted by evidence given by the witnesses responsible for denial of the conscientious objector status." When the United States Attorney and an F. B. I. agent appeared as custodians of the report in obedience to the subpoena, the court ordered that it be quashed (R. 9–10).

SUMMARY OF ARGUMENT

A. When petitioner registered with his local board in 1948, he did not claim to be either a conscientious objector or a minister, and he was

classified I–A (available for military service). He first sought exemption as a conscientious objector in 1951, upon the termination of the dependency deferment which had followed his marriage, and his reclassification as I–A. The religious conversion underlying his claim of exemption occurred after his registration, and he was a civilian employee in a United States naval facility both before and after his asserted change. Both in his personal appearance before the local board and in taking an appeal to the appeal board, petitioner pressed only his claim for exemption as a minister. Moreover, his violent and abusive treatment of his wife between 1950 and 1952 certainly bears on the sincerity of his assertion of religious scruples against participation in war in any form. These circumstances constituted an ample basis in fact for the appeal board's denial of petitioner's claim for exemption as a conscientious objector. *Estep* v. *United States,* 327 U. S. 114, 122–123. Thus, this case does not, as petitioner contends, present a question as to whether such a claim can be denied solely upon the ground that the registrant's scruples were acquired coincident with the threat of induction.

B. Petitioner's argument that there was no basis in fact for denial of his claim for exemption as a conscientious objector, is based on the assumption that his mere assertion of his claim is sufficient to make out a *prima facie* case for such status. His argument is founded on a

misapprehension of the decision of this Court in *Dickinson* v. *United States,* 346 U. S. 389, where this Court held, with respect to a claim for a ministerial exemption, that when a registrant has reinforced his claim by testimony and documentary evidence, a local board is not free to disbelieve him in the absense of affirmative impeaching or contradictory evidence.

This Court has never suggested that the unique tribunals created by Congress to administer the Universal Military Training and Service Act must in all cases accept as sufficient the unsupported statements of a registrant who has the burden of showing that he is entitled to exemption. Moreover, *Dickinson* involved a claim for ministerial exemption which hinges upon the relatively objective issues of whether the registrant practices as a minister and his status in relation to the other members of his religious group. However, a claim for exemption as a conscientious objector involves the subtle and subjective issue of the sincerity of the registrant's alleged convictions. Such issues must be largely resolved upon the inferences which may be drawn from demeanor, the circumstances in which the claim is asserted, and the registrant's daily life. In the instant case, the facts and circumstances surrounding petitioner's claim for exemption as a conscientious objector constituted an ample basis in fact for the denial of his claim, particularly since the

petitioner's case consisted of only his unsupported statements.

II

Petitioner contends that he was denied a fair hearing by the Department of Justice in that the hearing officer failed to inform him of evidence adverse to his claim. Although petitioner was informed that, upon his request prior to the hearing date, he would be furnished with a résumé of any adverse evidence in the possession of the hearing officer, he made no such request prior to the hearing. The principal contention here is that the hearing officer failed to disclose to petitioner that he had information, obtained from police records, that petitioner had treated his wife with violence and abuse subsequent to his alleged religious conversion, although this conduct was relied upon by the Department of Justice in recommending that petitioner's claim be denied. Since the hearing officer, after referring to the F. B. I. investigatory report and to information in that report concerning petitioner's earlier gambling, asked petitioner's wife in his presence how he was treating her, petitioner was adequately informed that the hearing officer was aware of his maltreatment of her. Petitioner does not allege that he did not understand this reference to his treatment of his wife. Moreover, the fact he does not even allege that he was prejudiced, in that he would have denied

or justified his conduct as derived from police records, requires that his classification by the appeal board be sustained. *Market Street Railway Co.* v. *Railroad Comm. of California,* 324 U. S. 548, 561–562.

III

The trial judge properly quashed the petitioner's subpoena seeking to compel production, prior to trial, of the F. B. I. investigatory report on his claim for exemption. The petitioner contends that he (and any other registrant in his position) must be furnished the report to enable him to determine whether it contained information adverse to his claim which was not disclosed to him by the Department of Justice hearing officer. This contention overlooks the auxiliary role of the Department of Justice in these cases, the limited record before the selective service appeal board which alone had the power of decision, and the necessity for a showing of cause before courts will undertake such collateral inquiries.

In *United States* v. *Nugent,* 346 U. S. 1, this Court, recognizing the limited advisory function of the Department and the summary, informal character of the entire classification process, held that a registrant need not be furnished with the F. B. I. investigatory report in connection with the hearing before the Department. It would be anomalous if the "all-out collateral attack" which this Court refused to permit in the auxiliary proceedings of the Department can never-

theless be undertaken in enforcement proceedings in which the courts determine only whether the appeal board's decision has a basis in fact.

The selective service appeal board received the recommendation of the Department of Justice, but not the report of the hearing officer or the F. B. I. investigatory report. Thus, the appeal board, in making the decision, had before it only such adverse information from the F. B. I. report as was set forth in the Department's recommendation, and which had been disclosed to petitioner by the hearing officer. Where the appeal board's decision has ample basis in fact, it should not be set aside on the ground that there may exist other evidence adverse to petitioner's claim but unknown to the appeal board.

Petitioner has stated no cause for belief that the F. B. I. investigatory report contained evidence adverse to his claim which was not disclosed to him and which may have influenced the Department's recommendation. Since the recommendation is expressly based upon evidence which was disclosed to the petitioner, it should not be presumed that it was based upon undisclosed matters. Decisions holding that the government ordinarily may not withhold relevant evidence from a court which is the trier of facts do not require here a collateral inquiry, without any showing of justification, into the formulation of a Department of Justice recommendation which was not binding upon the appeal board.

ARGUMENT

I

THE APPEAL BOARD PROPERLY DENIED PETITIONER'S CLAIM FOR EXEMPTION AS A CONSCIENTIOUS OBJECTOR

Petitioner concedes (Pet. Br. 29) that, in a criminal prosecution for refusal to be inducted under the Universal Military Training and Service Act, a registrant's classification by the selective service authorities may be held invalid only if it is without "basis in fact." *Estep* v. *United States,* 327 U. S. 114, 122–123; *Dickinson* v. *United States,* 346 U. S. 389, 394. However, he contends that the denial of his claim for exemption as a conscientious objector lacks a basis in fact. Moreover, he asserts that under this Court's decision in *Dickinson* v. *United States, supra,* the selective service authorities must accept as true his statements as to his conscientious objections, without regard to the surrounding circumstances, unless there is adduced affirmative evidence explicitly rebutting his statements. We contend that there was ample basis in fact for the appeal board's denial of petitioner's claim for exemption. We submit, further, that petitioner misreads the *Dickinson* decision even as applied to ministerial claims and that, in any event, the rationale of the decision does not apply to conscientious objector claims.

A. THERE WAS AMPLE BASIS IN FACT FOR THE DENIAL OF PETITIONER'S CLAIM FOR EXEMPTION

In 1948, when petitioner registered with his local board and filled out his selective service questionnaire, he was admittedly neither a minister nor a conscientious objector. Accordingly, in December 1948, petitioner was classified 1–A (available for military service). Petitioner married in 1949 and, from June to October 22, 1951, he was classified 3–A (dependency deferment). On October 22, 1951, the local board placed petitioner in class 1–A, and he was sent a classification notice to this effect on October 23, 1951 (R. 45). Petitioner immediately requested the Selective Service Form 150, Special Form for Conscientious Objectors (R. 28), for it was sent to him on October 25 (R. 46). On October 28, according to petitioner's testimony at the trial, he was ordained as a minister (R. 26). On October 30, his executed Special Form for Conscientious Objectors was received by his local board (R. 46). In the special form, petitioner's answer to question 3 is vague as to when he became a conscientious objector and, indeed, his answers to questions 3, 6, and 7 strongly suggest that he was actually seeking exemption as a minister rather than as a conscientious objector (R. 47–48). At this time, petitioner apparently was still a civilian employee at a United States Naval Base (R. 48).

On November 26, 1951, the local board continued petitioner in class 1–A, and on December

10, petitioner was accorded a personal appearance before the local board. There was before the local board at this hearing petitioner's Form 150 and a letter (R. 66–68) in which he stated that he was a minister and that he was averse to "Turning aside from that assigned duty, to engage in serving another master, to perform other work assigned by the Civil State, or refraining from preaching because of compliance with arbitrary commands to stop * * *."[8] On his personal appearance, petitioner told the local board that "he was seeking classification as a minister and not as a conscientious objector" (Gov. Ex. ICC, R. 68–69, the local board's record of the personal appearance).[9]

After the local board, on December 11, 1951, again classified petitioner 1–A, petitioner wrote

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[8] While the case seems to have turned on lack of sincerity, without reaching the question presented in *Sicurella* v. *United States*, No. 250, this Term, as to the application of the statutory exemption to certain sincerely held beliefs, petitioner's own statements show only opposition to service under government authority which would interfere with his ministry. For the reasons discussed in the government's brief in *Sicurella*, petitioner would not be entitled to exemption on such grounds, even if there were no finding of lack of sincerity.

[9] While petitioner now contends that he claimed exemption as both a minister and conscientious objector before the local board (Pet. br. 11), he testified at the trial that in executing the Form 150 he thought he was applying for exemption as a minister, and that at his personal appearance before the local board he claimed only the ministerial exemption (R. 26–32).

a letter (R. 64–65) to the local board in which he expressed his desire to appeal to the selective service appeal board, in the following terms:

> Receive your letter stating that I am still in the class (1–A). Still being *unsatisfy* with it, would like to have my records stating that I am a minister of the true religion, and also the letters that were sent to you be brought up to the Board of Appeals for further consideration.

The remainder of his letter was devoted entirely to substantiating his claim for a ministerial exemption. In brief, up to this time, petitioner had adduced practically no showing of personal religious conviction against participating in war in any form.

At this point, the case before the appeal board was that of a registrant who had claimed a ministerial exemption only when he had been classified 1–A, who was employed at a United States Naval Base, and who, although he had filed the special form for conscientious objectors (Form 150), had informed both the local board and the appeal board that he was seeking only a ministerial exemption. However, as is the practice whenever a registrant's file contains a Form 150 which has not been withdrawn, the appeal board referred the case to the Department of Justice for inquiry and hearing pursuant to Section 6 (j) of the Act.

Following a hearing before a Department of Justice hearing officer and the receipt of his

report and recommendation, the Department prepared and forwarded its recommendation (R. 52–55) to the appeal board. The Department's recommendation, based upon the report of an F. B. I. investigation and the hearing officer's report, stated that a number of persons acquainted with petitioner regarded him as sincere. It referred to information that at one time petitioner had been gambling and drinking heavily, and to evidence that he had since reformed. The recommendation also referred to information obtained from police records that petitioner had been violent or abusive to his wife on three occasions between May 1950 and January 1952. The core of the Department of Justice recommendation was as follows (R. 54):

> From the available information it appears that registrant had little, if any, religious training prior to November 1949 and it was not until after his 3–A classification was changed to 1–A that he evidenced any conscientious objection. From the time he first attended a Bible study class until approximately October 1951, registrant had a little less than two years of Jehovah's Witness religious training. In addition to the fact that his religious activities coincide with pressing induction possibilities, registrant's absorption and sincerity as to his newly found religion is rendered more questionable by his abusiveness and the exercise of physical vio-

> lence towards his wife. In this connection police records reflect a complaint by his wife as late as January 6, 1952.

Thus, in finally determining petitioner's claim for exemption as a conscientious objector because of his religious convictions, the appeal board had before it a number of circumstances strongly indicating that petitioner was not sincere: (1) he claimed exemption as a conscientious objector (and as a minister) only when he was again classified 1–A upon the termination of his dependency deferment; (2) he continued to work at a naval base both before and after his religious conversion;[10] (3) the fact that he sought from the local board and appeal board only a ministerial exemption suggested that his assertion of conscientious objections was both a mistake initially and an afterthought before the Department of Justice; and (4) his violent and abusive behavior toward his wife, following the commencement of his religious activities, scarcely comported with that of a person of deep religious convictions, and especially one claiming to be a minister. We submit that in these circumstances

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[10] The Courts of Appeals for the Ninth and Tenth Circuits have held that a registrant's willingness to work on war materials for a private employer is a factor which may be considered by selective service boards in appraising the sincerity of his claim of conscientious objection. *Roberson* v. *United States*, 208 F. 2d 166, 169 (C. A. 10); *White* v. *United States*, 215 F. 2d 782, 785–786 (C. A. 9), now pending on petition for certiorari, No. 390.

there was ample basis in fact for the action of the appeal board in denying petitioner's claim for exemption and placing him in classification 1–A.

There is no basis for petitioner's contention that this is a case in which the sincerity of his statements as to his conscientious objections is undisputed, and that his claim for exemption was denied solely upon the ground that he was a last-minute convert to Jehovah's Witnesses (Pet. Br. 28, 38).[11] To begin with, the principal basis for denying a claim for exemption as a conscientious objector within the statutory definition (*i. e.*, leaving aside questions as to the true character of the claim, such as are presented in *Sicurella* v. *United States,* No. 250) is the registrant's lack of sincerity. In the instant case, the Department of Justice recommended that petitioner's claim for exemption be denied for lack of sincerity. Thus, the crux of the Department's recommendation is the conclusion that (R. 54)

> In addition to the fact that his religious activities coincide with pressing induction possibilities, registrant's absorption and sincerity as to his newly found religion is rendered more questionable by his abusiveness and the exercise of physical violence toward his wife.

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[11] Elsewhere in his brief (Pet. Br. 52), petitioner concedes that the adverse recommendation of the Department of Justice was based upon other factors as well.

As we have pointed out, the record before the appeal board contained such persuasive indications of petitioner's lack of sincerity that it can only be assumed that it denied his claim on that ground.

We do not suggest that the lateness of religious conversion or of a crystallization of religious scruples against participation in war should preclude a sincere conscientious objector from obtaining exemption. It is conceded that suddenly acquired convictions may be as sincerely held as those of long standing. However, we contend that where the initial assertion of conscientious objections coincides with the imminence of induction for military service, such circumstance, either alone or in combination with other factors, may justify denial of exemption. This Court has deemed relevant a close time parallel between sudden changes in religious activities of registrants and the selective service processes. Compare: *Eagles* v. *Samuels,* 329 U. S. 304, 316–317 (sudden return to divinity school at time of returning selective service questionnaire); *Eagles* v. *Horowitz,* 329 U. S. 317, 322 (entry into a seminary shortly after passing the physical examination and qualifying for military service). Here, as elsewhere, "the conclusions and tests of everyday experience must constantly control the standards of legal logic." 1 Wigmore, *Evidence* (3d ed. 1940), Section 27, p. 407.

However, the instant case does not present the question of whether petitioner's belated assertion of conscientious objections, taken by itself, would provide a basis in fact for the denial of his claim. Here, as we have shown, that circumstance is but one of several factors which, taken together, afforded strong support for the conclusion of the appeal board that his claim was not sincere.

B. DICKINSON V. UNITED STATES, 346 U. S. 389, DID NOT REQUIRE THAT PETITIONER'S CLAIM FOR EXEMPTION BE GRANTED

Petitioner contends that the appeal board's denial of his claim for exemption as a conscientious objector was precluded under *Dickinson* v. *United States,* 346 U. S. 389, in that, he says, he sufficiently established his status by his statements in the special form for conscientious objectors and the government adduced no evidence to the contrary (Pet. Br. 30–32). That is, he contends that in *Dickinson* this Court held that a registrant's conclusory statements in support of a claim for exemption must be accepted as true, no matter how inconsistent they may be with facts and circumstances disclosed by the registrant and with his conduct, unless the selective service authorities bring forward affirmative evidence to rebut his conclusions. Applied to this case, petitioner argues that the selective service boards could deny his claim for exemption only if they adduced independent evidence contradicting

his statements. We believe that petitioner has misread this Court's decision in *Dickinson* v. *United States, supra,* even as applied to a claim for ministerial exemption such as was involved in that case.

In the *Dickinson* case, the registrant, a Jehovah's Witness, sought exemption as a minister, supporting his claim not only by his own oral and written statements but also by written statements from the Watchtower Bible and Tract Society and other Jehovah's Witnesses (346 U. S. at 392). This Court, while reiterating that "the selective service registrant bears the burden of clearly establishing a right to the exemption" (346 U. S. at 395), held that, upon the proof presented by Dickinson, his claim for a ministerial exemption could not be denied solely because of skepticism based upon his youth and "the customary claim of Jehovah's Witnesses to ministerial exemptions." It was in this context that the majority of this Court stated (346 U. S. at 396) that:

> * * * The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities.

Thus, we do not understand *Dickinson* as holding, even for claims of ministerial exemption, that selective service boards must accept as true, without regard to their inherent weakness or the

surrounding circumstances, every assertion of registrants that they satisfy statutory requirements for an exemption. The burden is on each registrant to establish clearly that he is entitled to exemption from the common duty of military service. The nature of this burden is emphasized by the unique character of the tribunals which the Congress established to determine such claims. Congress did not create the familiar type of administrative agency, such as the Interstate Commerce Commission. Nor was it under any constitutional compulsion to do so. *United States* v. *Nugent,* 346 U. S. 1, 8. Instead, it provided for the establishment of local boards and appeal boards composed of uncompensated civilians with local board members required to be residents of the county and recommended by the governor of the State. Congress has not imposed upon such boards formal procedural requirements and it has precluded direct judicial review of their decisions. In conscientious objector cases, even after an inquiry and hearing by the Department of Justice far more elaborate than any proceeding within the Selective Service System, the appeal board need only consider, but is not required to follow, the Department's recommendation. In brief, Congress was creating a summary procedure under which the chief safeguards against oppression are its roots in the registrant's home community and in opportunities for *de novo* review within the Selective Service System.

In this context, it is clear that Congress was placing upon each registrant claiming an exemption the entire burden of showing that he was clearly entitled to it. The registrant is free to present any evidence he desires in support of his claim. If he relies solely upon his own statements, as did the petitioner in this case, he must do so at the risk that any circumstances surrounding his claim, such as its timing in relation to the threat of induction, his demeanor, and (in conscientious objector cases) inconsistent conduct called to the attention of the appeal board by the Department of Justice, which rationally tend to impeach his claim, will support a denial of it. The registrant cannot shift the burden of proof to the selective service boards unless, as in *Dickinson,* he reinforces his personal statements with additional evidence sufficient to preclude rational men from attaching significance to circumstances which would otherwise provoke doubts.

Furthermore, *Dickinson* v. *United States, supra,* even as properly read, is not applicable here for several reasons. To begin with, that case involved a claim for a ministerial exemption which involves the relatively objective issue of whether the religious activities of a registrant and his status in relation to other members of his religious group satisfy the definition of minister in Section 16 (g) of the Act. In sharp contrast, in conscientious objector cases the cru-

cial issue is the registrant's *subjective belief*.[12] What he does is important only insofar as it reflects his mental state. Thus, the issue is the sincerity of the registrant's claim. The elusive nature of the determination is emphasized by the fact that in these cases Congress has provided that the appeal procedure for conscientious objector claims shall include an inquiry and hearing by the Department of Justice on "the character and good faith of the objections of the person concerned." For this reason, the procedure before the hearing officer is non-adversary and informal, designed to draw out the essence of what the claimant actually believes. The legislative history of Section 6 (j) which is discussed in detail in the Government's brief in *United States* v. *Nugent* (No. 540, O. T. 1952), shows that an essential function of the reference to the Department of Justice is to provide the selective service appeal boards with an appraisal of the sincerity of registrant's claim by an outside agency on the basis of a personal interview.

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[12] The typical methods of the hearing officer are described as follows in Sibley & Jacob, *Conscription of Conscience* (1952, Cornell University Press), pp. 72–73:

> The Hearing Officer's interview with the objector was usually rather informal, and to it the latter might bring friends or advisers who might be given an opportunity to testify. As likely as not, the Officer's first comments might be for the purpose of putting the appellant at ease. Questions would concern past life, religious affiliations, basis for objection, and social and political views. Frequently, the Officer would inquire into any alleged inconsistencies in the conduct

This Court has recognized the duty of the Selective Service System to prevent the exemptions provided by Congress from being used by draft dodgers. *Eagles* v. *Samuels, supra; Eagles* v. *Horowitz, supra.* The ordinary lives of most men are not clearly inconsistent with an assertion of religious scruples against participation in war. On the other hand, we know that most men are not conscientious objectors. Thus, when a registrant claims exemption as a conscientious objector, the inferences that may be drawn from his demeanor and from the circumstances surrounding the assertion of his claim take on a much greater significance than they do in the relatively objective claims for ministerial exemption or occupational or dependency deferments. If, on the basis of such factors, rational men could entertain serious doubts as to the registrant's sincerity, there exists a basis in fact for the denial of his claim.

In the instant case, petitioner's claim for exemption as a conscientious objector is based solely

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of the objector: for example, how could he reconcile his service in the National Guard (at one period in his life) with his present position? Or, to illustrate more particularly: in one case the objector, shortly after Pearl Harbor, had applied for service with Naval Intelligence, wrongly thinking that it would be noncombatant service. Denied employment, he had then returned to his earlier beliefs, which had rejected both combatant and noncombatant service. The Hearing Officer tried to determine, by a series of questions, whether his return to pacifist views of the more extreme kind was sincere. The applicant convinced the Hearing Officer that his change in outlook was genuine, and the Officer thereupon recommended IV–E.

upon his own statements, in contrast with the testimony of others and the documentary evidence by which the claim for ministerial exemption in *Dickinson* was supported. Here, circumstances relating to good faith and sincerity, which were regarded as of little significance in ascertaining whether Dickinson was a minister, are crucial in determining whether petitioner is conscientiously opposed to participation in war in any form. Finally, the facts and circumstances before the appeal board in this case constitute a far more persuasive basis in fact for rejecting petitioner's claim than were present in the *Dickinson record*.[13]

II

PETITIONER WAS ACCORDED A FAIR HEARING BY THE DEPARTMENT OF JUSTICE AND HE HAS FAILED TO SHOW THAT HE WAS PREJUDICED.

The petitioner contends that he was denied a fair hearing before the Department of Justice hearing officer because the hearing officer refused to give him a fair résumé of information adverse to his claim in the F. B. I. investigative report. In the first place, the failure of the registrant to request "before the date set for the hearing" that he be advised as to the "general nature and character" of any evidence in the hearing officer's possession adverse to his claim, as required by

[13] On the relation of the *Dickinson* case to conscientious objector claims, see also the Brief for the United States, in *Witmer* v. *United States*, No. 164, this Term, at pp. 18–22.

the Department's Instructions to Registrants (App. B, *infra,* pp. 56–58), which was furnished to him (R. 32), should preclude him from now complaining about the inadequacy of information supplied to him at the hearing on his spur-of-the-moment request. (Pet. Br. 40–53). We contend that petitioner was in fact adequately advised of the information adverse to his claim. Also, even assuming that he was not, we urge that since petitioner makes no attempt to show that he was prejudiced, his classification should not now be held invalid and his conviction set aside.

In this case, as in similar cases, after the selective service appeal board referred the case to the Department of Justice, the Federal Bureau of Investigation made an investigation of petitioner's claim. The report of this investigation was furnished to the hearing officer prior to the hearing and was before the Department when it formulated its recommendation to the appeal board. The report was not made available to the petitioner. In *United States* v. *Nugent,* 346 U. S. 1, this Court held that neither the Constitution nor the Act requires that the investigatory report be furnished to a registrant. However, we assume with the petitioner that under *Nugent* the Department must supply a registrant, at his request, "with a fair résumé of any adverse evidence in the investigator's report" (346 U. S. at 6).

At this point, it will be useful to clear up certain misunderstandings in the petitioner's brief.

First, petitioner asserts that, at the time of his hearing before the Department of Justice hearing officer, the Department's regulations prohibited the hearing officer from giving the registrant a summary or résumé of evidence adverse to his claim; he states that not until September 1953, following this Court's decision in *Nugent,* did the regulations permit the registrant to obtain such a résumé (Pet. Br. 41). These statements are erroneous. The Instructions to Registrants in effect at the time of petitioner's hearing (which are set forth in Appendix B to this brief) expressly provided that

> Upon request therefor by the registrant at any time after receipt by him of the notice of hearing and before the date set for the hearing, the hearing officer will advise the registrant as to the general nature and character of any evidence in his possession which is unfavorable to, and tends to defeat, the claim of the registrant such request being granted to enable the registrant more fully to prepare to answer and refute at the hearing such unfavorable evidence.

This precise provision was involved in *Nugent,* in which this Court at least implied that a registrant who failed to ask for such a résumé could not thereafter complain if his claim was denied upon the basis of evidence not disclosed to him (346 U. S. at 6–7). This disposes of petitioner's further contention that *Nugent* held that both

the Act and due process of law require that a résumé be given to the registrant regardless of whether he asks for it. Since September 1953, the Department's regulations have provided that a written résumé of both favorable and unfavorable evidence will be routinely furnished to each registrant prior to the hearing. This provision was not applicable to petitioner's hearing in August 1952. There is no basis for petitioner's repeated statement (Pet. Br. 41, 42, 52) that the Government concedes that this amendment was required by the *Nugent* decision.

Thus, petitioner was informed by the Instructions to Registrants, which were attached to the notice of hearing, that at his request "and before the date set for hearing" the hearing officer would advise him "as to the general nature and character of any evidence in his possession" adverse to his claim. Since the petitioner failed to request such a résumé prior to the hearing, as required by the regulation, he can scarcely complain if his sudden request for such a résumé in the course of the hearing results in an inadequate reply by the hearing officer. The Department does not require or encourage formality in these proceedings. However, we submit that one who was so indifferent to this offered opportunity may not later attack the hearing officer's voluntary disclosure not required by the regulations.

In any event, it is clear that petitioner was not entitled to a summary of adverse information in

the abstract, but rather to a summary of any adverse information entering into the Department's recommendation, and therefore becoming part of the basis for decision by the selective service appeal board which, rather than the Department, has decisive power. As this Court noted in *Nugent* (346 U. S. at 7, fn.), the contents of the F. B. I. investigatory report are irrelevant unless they become a part of the record before the appeal board.

In the instant case, as in other cases, the F. B. I. investigatory report was not made available to the selective service appeal board.[14] Thus, the appeal board had no knowledge of the contents of the report except to the extent that they were referred to in the recommendation of the Department. Turning to the Department's recommendation (R. 52–55), the first third of it consists of a summary of the information which petitioner furnished to his local board (R. 53). Next, it recites that petitioner's neighbors and coreligionists believe him to be sincere (R. 53). Then, the recommendation states (R. 53–54) that:

> A confidential informant, of known reliability, reports that during the last seven or eight months registrant was actively engaged in distributing pamphlets: that prior to that time registrant was person-

[14] In *Brewer* v. *United States*, 211 F. 2d 864 (C. A. 4), the F. B. I. investigatory report was sent to the appeal board inadvertently.

> ally known to him as a rather heavy drinker and crap shooter in and around local taverns and pool halls. This informant believes registrant is now sincere. Registrant states he has changed his ways and now prays many times during the day. His wife also states he has changed.

Admittedly, information as to petitioner's gambling and drinking would be adverse to his claim. However, since such information was coupled with evidence of his reform, the entire quoted statement would seem to confirm that his religious conversion was sincere, and thus was not adverse to his claim. In any event, the quoted statement indicates that petitioner was apprised of the evidence as to his drinking and gambling, and he has so admitted at the trial (R. 19) and in his brief in this Court (Pet. Br. 40).

Next, the Department's recommendation contains the following statement (R. 54):

> Police records reflect that registrant was arrested May 29, 1950 on a complaint by his wife that he pulled her out of a car and hit her in the face—fined $13.60; on June 12, 1950 police were called to settle a "hot argument" and on January 6, 1952, wife claimed registrant was abusive. Police settled last two matters so no charges were filed.

Since this information was not volunteered, it must be assumed that it was contained in the

F. B. I. investigatory report, as in fact it was. It was adverse to petitioner's claim and it was one of the factors expressly relied upon by the Department in recommending denial of his claim (R. 54). At the trial, petitioner testified that after the hearing officer had told him that he had the F. B. I. report concerning petitioner and that "it was reported that I was hanging around pool rooms," he asked the hearing officer "what else was in the report." Thereafter, petitioner testified, "He asked my wife how she was feeling, and how was I treating her. My wife said 'Fine'" (R. 19).

Perhaps in most cases, a hearing officer's question would not apprise a registrant of the "general nature and character" of evidence adverse to his claim. In the instant case, however, we submit that the hearing officer's question, addressed to petitioner's wife in his presence, was a sharp and challenging indication to petitioner that the hearing officer was aware of his public record of maltreating his wife, a relatively recent matter obviously within his knowledge. It was not an allusion to the statements of a secret informant which might be unknown to petitioner. Even now, he does not contend that he did not understand this question as relating to his past treatment of his wife.

Even more significant, and assuming that petitioner was not apprised of, and given an opportunity to explain or rebut, the evidence of

his violent and abusive treatment of his wife, he has not yet offered to show that he was prejudiced. He has not yet stated, for example, that he was prepared to impeach or contradict this information obtained from police records, as by showing a mistake of identity or that he had acted in self-defense or under intense provocation.[15] He does not suggest that he would have more to say than that he had since reformed, an allegation implicit in his claims for exemption as a minister and as a conscientious objector.

In a highly similar situation, involving the order of a state regulatory commission subject to more formal procedural standards and broader judicial review than are applicable to selective service determinations (*Market Street Railway Co.* v. *Railroad Comm. of California*, 324 U. S. 548, 561–562), this Court stated:

> No contention is made here that the information was erroneous or was misunderstood by the Commission, and no contention is made that the Company could have disproved it or explained away its effect for the purpose for which the Commission used it. * * * It does not appear that the Company was in any way prejudiced thereby, and it makes no showing that, if a rehearing were held to introduce its own reports, it would gain much by cross-examination,

[15] Petitioner's cautious statement, buried in his brief (Pet. Br. 39), that "the truthfulness of these FBI reports is questioned," is not even an adequate allegation of prejudice.

> rebuttal, or impeachment of its own auditors or the reports they had filed. Due process, of course, requires that commissions proceed upon matters in evidence and that parties have opportunity to subject evidence to the test of cross-examination and rebuttal. But due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate right of parties.

We submit that this rule of prejudicial error which applies to the proceedings of ordinary administrative agencies[16] should be applied freely, *a fortiori,* to the proceedings of the unique selective service tribunals upon which Congress relies for expeditious administration of the Universal Military Training and Service Act. Accordingly, in the absence of such a specific showing of actual prejudice, petitioner's classification by the selective service appeal board should be sustained.

III

THE TRIAL COURT PROPERLY QUASHED PETITIONER'S SUBPENA TO COMPEL PRODUCTION OF THE F. B. I. INVESTIGATORY REPORT

Prior to the trial of this case, petitioner attempted to subpena the F. B. I. investigatory

[16] Section 10 (e) of the Administrative Procedure Act (5 U. S. C. 1009), while not applicable to selective service decisions, instructs reviewing courts that "due account shall be taken of the rule of prejudicial error." See also Rule 61 of the Federal Rules of Civil Procedure and Rule 52 of the Federal Rules of Criminal Procedure.

report made after his claim had been referred to the Department of Justice. As noted above, this report was available to the hearing officer and to the Department, but was not available to the registrant. In his affidavit in opposition to the Government's motion to quash the subpena, petitioner contended that he was entitled to examine the entire F. B. I. investigatory report as "a part of * * * the basis of the administrative determination," and that withholding the report "will deprive the defendant of his right to be confronted by evidence given by the witnesses responsible for denial of the conscientious objector status" (R. 8–9). He also contended generally that production of the F. B. I. report would show "that defendant did not get a fair résumé of adverse evidence in said report" (R. 8). We contend that the trial judge properly quashed the petitioner's subpena (R. 9–10).

In this Court, petitioner now contends only that he was entitled to require by subpena the production of the F. B. I. report in order to ascertain whether he had been given a fair résumé of evidence in the report adverse to his claim. The core of petitioner's contention is that if there was adverse evidence in the F. B. I. report, other than that set forth in the Department's recommendation, it may have influenced or affected the formulation of the recommendation (Pet. Br. 64). Thus, he is inviting the courts

to inquire into the mental processes underlying the Department's recommendation.

This position is contrary to the rationale of the decision of this Court in *United States* v. *Nugent,* 346 U. S. 1, as petitioner himself seems to recognize by his request (Pet. Br. 72–73) that such decision be reconsidered. See also *United States* v. *Dal Santo,* 205 F. 2d 429, 431–432 (C. A. 7), certiorari denied, 346 U. S. 858; *White* v. *United States,* 215 F. 2d 782 (C. A. 9), and *Tomlinson* v. *United States,* 216 F. 2d 12 (C. A. 9), petitions for certiorari pending Nos. 390 and 391, this Term. It would be anomalous to hold, as this Court did in the *Nugent* case, that a registrant is not entitled to see the reports before or at the Department of Justice hearing, and yet hold that he can see them at a criminal trial after the hearing.[17]

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[17] Packer, whose case was joined with that of Nugent on review (Nos. 540 and 573, O. T. 1952), moved pursuant to Rule 17 (c), F. R. Crim. P., for production and inspection of the F. B. I. reports and he caused a subpoena duces tecum to be served on the New York office of the F. B. I. The trial court denied the motion for inspection and granted the government's motion to quash the subpoena (see p. 6, fn. 3, Brief for the United States, *ibid.*). In the Joint Brief for Respondents (Nos. 540, 573, O. T. 1952), respondent Packer, as his fourth point, argued to this Court that (*ibid.*, p. 181), "reversible error requiring a new trial was committed by the trial court in the *Packer* case by quashing the subpoena duces tecum issued to compel the production of the F. B. I. report at the trial." Apparently, this Court deemed the issue either fully answered by its *Nugent* opinion, or unsubstantial. Respondent Packer, in a joint Petition for Rehearing in the same case, argued that this Court erred in failing

The collateral inquiry demanded by the petitioner is inconsistent with the auxiliary role of the Department of Justice in these cases. The Department's recommendation is merely advisory; the ultimate classification is made by the selective service appeal board. As this Court said in the *Nugent* opinion (346 U. S. at pp. 8–9):

> If the local board denies the claim, the responsibility for review, if sought, falls upon the appeal board. The Department of Justice takes no action which is decisive. Its duty is to advise, to render an auxiliary service to the appeal board in this difficult class of cases. Congress was under no compulsion to supply this auxiliary service—to provide for a more exhaustive processing the conscientious objector's appeal. Registrants who claim exemption for some reason other than conscientious objection, and whose claims are

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to consider the issue of whether he should have been allowed to subpena and inspect the F. B. I. reports at the trial, stating (p. 45):

> The courts cannot determine whether a résumé is fair without seeing the F. B. I. report. It cannot be seen without having it produced. Its production cannot be compelled without subpoena. The proper subpena in the *Packer* case was improperly quashed. The importance of this question commands that this Court grant this petition for rehearing.

Respondent Packer also joined in a Motion for Clarification of Opinion in which he prayed this Court to remand the case to the Court of Appeals "for further proceedings on the questions properly raised but not determined." This Court denied both applications. 346 U. S. 853.

denied, are entitled to no "hearing" before the Department. Yet in this special class of cases, involving as it does difficult analyses of facts and individualized judgments, Congress directed that the assistance of the Department be made available whenever a registrant insists that his conscientious objection claim has been misjudged by his local board. Observers sympathetic to the problems of the conscientious objector have recognized that this provision in the statute improves the system of review by helping the appeal boards to reach a more informed judgment on the appealing registrant's claims. But it has long been recognized that neither the Department's "appropriate investigation" nor its "hearing" is the determinative investigation and the determinative hearing in each case. It has regularly been assumed that it is not the function of this auxiliary procedure to provide a full-scale trial for each appealing registrant.

Accordingly, the standards of procedure to which the Department must adhere are simply standards which will enable it to discharge its duty to forward sound advice, as expeditiously as possible, to the appeal board. Certainly, this is an important and delicate responsibility, but we do not think the statute requires the Department to entertain an all-out collateral attack at the hearing on the testimony obtained in its prehearing investigation.

The Court then concluded (346 U. S. at pp. 5–6):

> * * * We think that the statutory scheme for review, within the selective service system, of exemptions claimed by conscientious objectors entitles them to no guarantee that the F. B. I. reports must be produced for their inspection. We think the Department of Justice satisfies its duties under § 6 (j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the same time supplies him with a fair résumé of any adverse evidence in the investigator's report.

Since it is the action of the appeal board, rather than the recommendation of the Department of Justice, which is decisive, there is ordinarily no reason to determine whether the F. B. I. report contained adverse information which never became known to the appeal board. In the instant case, only the recommendation of the Department of Justice was sent to the appeal board. Since the Department's recommendation was based in part expressly upon evidence of petitioner's maltreatment of his wife, he was entitled, upon a proper request, to a résumé of the adverse evidence. Assuming that the F. B. I. report contained other adverse evidence which was not referred to and relied upon in the Department's

recommendation, it would be irrelevant in determining whether petitioner's classification by the appeal board has a basis in fact. Any other rule would place the courts in the position of setting aside selective service classifications, for which Congress has provided uniquely limited judicial review, upon the basis of matters occurring in the auxiliary and non-decisive proceedings before the Department and unknown to the appeal board. We submit that the reasoning which led this Court in *Nugent* to hold that the Act does not require the Department "to entertain an all-out collateral attack at the hearing on the testimony obtained in its prehearing investigation," also precludes such a collateral attack at the trial when the Department's recommendation has been superseded by the appeal board's decision. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 318–319; *C. & S. Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, 109.[18]

In the instant case, petitioner failed to make any showing in the trial court in support of his attempt to compel production of the F. B. I. report, and he does not attempt to make such

[18] The district court opinions cited by petitioner (*e. g.*, *United States* v. *Evans*, 115 F. Supp. 340 (D. Conn.); *United States* v. *Stasevic*, 117 F. Supp. 371 (S. D. N. Y.)), which assume that the "fairness" of the résumé given the registrant at the auxiliary hearing before the Department of Justice is a matter which is legitimately in issue in every enforcement case, fail to consider the advisory nature of the Department of Justice hearing.

a showing now. He has at no time set forth reasons for belief that the F. B. I. report contained information adverse to his claim which was not disclosed to him and openly referred to in the Department's recommendation. Rather, he contends that every registrant whose claim for exemption as a conscientious objector is denied, and who is thereafter prosecuted for refusal to be inducted, can compel production of the F. B. I. investigatory report in the vague hope that it contains adverse evidence which was not disclosed to him in the résumé authorized by the Department's regulations.

We submit that, particularly in view of the auxiliary and nondecisive character of the proceedings before the Department of Justice, an inquiry into the regularity of such proceedings is a purely collateral matter which should not be undertaken without a preliminary showing that the registrant's rights were violated. There may perhaps be special circumstances, as, for example, if the facts in the résumé given to a registrant are substantially different from those referred to in the Department's recommendation, where the interest of justice may require a court to examine the F. B. I. investigatory report.[19] There

[19] Another special set of circumstances was presented in *Brewer* v. *United States*, 211 F. 2d 864, 866 (C. A. 4), where, by inadvertence, the F. B. I. reports were sent to the appeal board. Since they thus became a part of the file on which the appeal board acted, the court ruled that the registrant was entitled to see them.

could conceivably be a showing that the Department's recommendation was based on undisclosed information to such an extent that the court would be justified in examining into the issue even though the appeal board did not have such information. But, certainly, there must be some such showing of special circumstances to justify a court in going behind the record on which the appeal board, which had the duty of classifying, acted.[20] Where the Department has stated the basis for its recommendation, a court would not be justified in assuming that it may have acted on some different, undisclosed basis. The usual presumption of regularity should attach to the Department's recommendation. *Koch* v. *United States*, 150 F. 2d 762, 763 (C. A. 4); *United States* v. *Fratrick*, 140 F. 2d 5, 7 (C. A. 7). See also: *Bute* v. *Illinois*, 333 U. S. 640, 672; *Ex parte Royall*, 117 U. S. 241, 252; *Coggins* v. *O'Brien*, 188 F. 2d 130, 138 (C. A. 1); *White* v. *Humphrey*, 115 F. Supp. 317, 322 (M. D. Pa.).

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[20] It should be noted that, even where circumstances are shown which would justify an order to produce the F. B. I. reports, the confidential nature of such reports would require that the normal procedure for the handling of such confidential materials be followed, *i. e.*, the documents should first be produced for inspection by the court as to their possible relevancy and should be shown to the defendant only if the judge finds them relevant. *United States* v. *Cohen*, 145 F. 2d 82, 92 (C. A. 2), certiorari denied, 323 U. S. 799; *Boehm* v. *United States*, 123 F. 2d 791, 807–808 (C. A. 8), certiorari denied, 315 U. S. 800; *United States* v. *Schneiderman*, 104 F. Supp. 405, 410 (S. D. Cal.).

Petitioner relies upon a group of cases holding that the government's privilege with respect to confidential reports cannot be invoked to bar disclosure of documents which may have a direct bearing on the issues presented at the trial. *United States* v. *Reynolds,* 345 U. S. 1, 12; *United States* v. *Beekman,* 155 F. 2d 580 (C. A. 2); *United States* v. *Krulewitch,* 145 F. 2d 76 (C. A. 2); *United States* v. *Andolschek,* 142 F. 2d 503 (C. A. 2). That issue is not, however, reached in this case because, whether a document is privileged or not, its production cannot be compelled without some showing that it would, if produced, be material to the case. For purposes of laying a foundation for the production of a document (as opposed to its admission into evidence or other use made of it on the trial) it must appear to the trial court that the evidence sought "is relevant, competent, and outside of any exclusionary rule". *Gordon* v. *United States,* 344 U. S. 414, 420. No such showing was made here. The demand was not intended to produce materials necessarily evidentiary, but was "a fishing expedition to see what may turn up" (*Bowman Dairy Co.* v. *United States,* 341 U. S. 214, 221), an invalid basis on which to compel inspection of a confidential government document. Petitioner cites Rule 17 (c) of the Federal Rules of Criminal Procedure, as authority, *inter alia,* for his attempted subpoena of the F. B. I. report

(R. 8). This rule is by its terms a device for compelling the production of *evidence,* not the pre-trial discovery procedure which is otherwise provided for by Rule 16. And relief under Rule 16, permitting a defendant pre-trial discovery and inspection in certain cases, is contingent upon "a showing that the items sought may be material to the preparation of his defense and that the request is reasonable". See: *Bowman Dairy Co.* v. *United States,* 341 U. S. 214, 219, 221; *United States* v. *Iozia,* 13 F. R. D. 335, 338.

There is no showing of special circumstances which would render relevant and material an unevaluated F. B. I. report which was not before the appeal board. The subpena was therefore properly quashed.[21]

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[21] Petitioner raised as a "question presented" in his petition (Pet. 5–6), but did not expand and does not now argue, the contention that the Selective Service System erred in failing to reopen his final classification on the basis of an affidavit, setting forth that his wife was confined in a tuberculosis sanitorium with an advanced form of that disease, and that she would be dependent on her husband "when she is able to leave the hospital." A letter signed by the medical director of the hospital was dated January 20, 1953 (R. 63), about 14 days after petitioner had been ordered to report for induction. Up to December 17, 1952, when petitioner was finally classified 1–A by his appeal board (R. 41), he apparently had said nothing in any document of record concerning any illness of his wife. The regulations provide that a classification "shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction * * * unless the local board first specifically finds there has been a change in the registrant's status resulting from circum-

CONCLUSION

It is therefore respectfully submitted that the judgment of the court below should be affirmed.

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WARREN OLNEY III,
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JANUARY 1955.

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stances over which the registrant had no control." 32 C. F. R. Section 1625.2. Even though "new facts are presented," if "the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification." 32 C. F. R. Section 1625.4. Since petitioner's wife was not dependent on him at the time of the order to report and the date of her release from the sanitarium could not be forecast at that time, petitioner could not show "extreme hardship" which alone justified deferment because of the dependency of a wife under Section 6 (h) of the Act.

APPENDIX A

Statute and Regulation Involved

Universal Military Training and Service Act, 62 Stat. 604, 65 Stat. 75:

Section 6 (h) [50 U. S. C. App. 456 (h)]:

> * * * The President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces or from training in the National Security Training Corps (1) of any or all categories of persons in a status with respect to persons (other than wives alone, except in cases of extreme hardship) dependent upon them for support which renders their deferment advisable * * *.

Section 6 (j) [50 U. S. C. App. 456 (j)]:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections

whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as

the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

Regulations of the Selective Service System:

32 C. F. R. 1625.2:

When registrant's classification may be reopened and considered anew. The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed

to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

APPENDIX B

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

Notice of Hearing

---------- ---------- ----------
City State Date

To: ----------
Name of Registrant

---------- ---------- ----------
Street Address City State

You are hereby notified that before the undersigned Hearing Officer at

Room ----------, ---------- ----------
Building Street Address

---------- ----------, at ----------
City State Hour

o'clock on ----------, ------, 195--, a hearing
Month Day

will be held by the Department of Justice to consider your claim to exemption from training and service under the Universal Military Training and Service Act by reason of your alleged conscientious objection to participation in war in any form. You have a right to be present at such hearing and to present any pertinent evidence in support of your claim. Enclosed is a copy of "Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed." You should read these instructions carefully.

----------, *Hearing Officer*
Special Assistant to the Attorney General

DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed

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Pursuant to the provisions of section 6 (j) of the Universal Military Training and Service Act and Section 1626.25 of the Selective Service Regulations, the Department of Justice will make an inquiry and hold a hearing with respect to the character and good faith of your claim for exemption from training and service under the said Act on the ground that you are conscientiously opposed to participation in war in any form.

1. The hearing will be conducted by the undersigned, a Hearing Officer duly designated by the Department of Justice as a Special Assistant to the Attorney General.

2. Upon request therefor by the registrant at any time after receipt by him of the notice of hearing and before the date set for the hearing, the hearing officer will advise the registrant as to the general nature and character of any evidence in his possession which is unfavorable to, and tends to defeat, the claim of the registrant such request being granted to enable the registrant

more fully to prepare to answer and refute at the hearing such unfavorable evidence.

3. At the hearing you will be permitted to make a full and complete presentation of your claim. You may bring with you to the hearing as witnesses any persons who have personal knowledge of facts concerning your religious training and belief and concerning the character and good faith of your objections to participation in war in any form.

4. You may bring with you and submit at the hearing written statements of persons not present at the hearing containing facts and information within their personal knowledge concerning your religious training and belief and the character and good faith of your objections to participation in war in any form. Such statements shall be sworn to or affirmed before a notary public or other person authorized to administer oaths. You may also submit at the hearing any papers or documents, or certified copies thereof, tending to support your claim. If you are unable to appear personally at the hearing, you may mail all such statements, documents, etc., to me at the address given in the Notice of Hearing.

5. The hearing will not be in the nature of a trial or judicial proceeding, but will be informal and non-legalistic. You will not be required to adhere to the ordinary rules of evidence. It will not be necessary for you to be represented

at the hearing by an attorney. You may bring with you a relative or friend or other adviser, who may sit with you at the hearing. Such person, whether an attorney or not, will not be permitted to object to questions or make any argument concerning any evidence or any phase of the proceeding. The hearing will at all times be under my direction and control. Violation of these instructions by you or your adviser may result in the termination of the proceeding.

Special Assistant to the
Attorney General

U. S. GOVERNMENT PRINTING OFFICE: 1938